

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Marvin Gerber,

Plaintiff,

vs.

Case No.2:19-cv-13726

Hon. Victoria Roberts

Henry Herskovitz, Gloria Harb, Tom Saffold,
Rudy List, Chris Mark, Deir Yassin Remembered, Inc.,
Jewish Witnesses for Peace and Friends, The City of Ann Arbor,
Ann Arbor Mayor Christopher Taylor, in his official
And individual capacities, Ann Arbor Community Services
Administrator Derek Delacourt, in his official and individual
capacities, Ann Arbor City Attorney Stephen Postema, in his
official and individual capacities, and Senior Assistant
City Attorney Kristen Larcom, in her official and individual capacities.

Defendants, Jointly and Severally.

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**EX PARTE MOTION BY DEFENDANTS HERSKOVITZ,
HARB, SAFFOLD, LIST AND MARK TO EXTEND THEIR
DEADLINE TO RESPOND TO COMPLAINT**

NOW COME Defendants HERSKOVITZ, HARB, SAFFOLD, LIST and MARK, by and through their attorneys, CYNTHIA HEENAN and HUGH M. DAVIS, of CONSTITUTIONAL LITIGATION ASSOCIATES, P.C. and JOHN A. SHEA, and say as follows:

1. The above-referenced individual Defendants (hereinafter “the Protester Defendants”) were personally served with the Summons and Complaint on Saturday, December 21, 2019. Their answer or other response is due by January 13, 2020.

2. The Complaint against the Protester Defendants, as well as various City of Ann Arbor government officials is 85 pages long, containing 223 paragraphs and alleging 20 separate counts.

3. The majority of the counts are alleged against the Protester Defendants and they are alleged to have conspired with the City Defendants as to the remainder of the allegations.

4. The Complaint seeks a preliminary and permanent injunction prohibiting the Protester Defendants from engaging in weekly protests which have been ongoing for 16 years. However, no motion for injunction nor an Order to Show Cause has been filed. Plaintiff also seeks compensatory and punitive damages.

5. Undersigned counsel, and co-counsel John A. Shea, have agreed to represent the Protester Defendants on a *pro bono* basis as they lack funds to retain counsel.

6. Prior to answering the complaint, these Defendants, through undersigned counsel and hopefully additional attorneys to be recruited, intend to file a motion pursuant to F.R.Civ.P. 12(b), including; but not limited to 12(b)(6) – failure to state a claim.

7. Currently, the Protester Defendants' motion(s) would have to be filed by January 13, 2020.

8. The City Defendants have requested and been granted (by Plaintiff's counsel) an extra 14 days, until January 27, 2020, to file their responsive pleadings or Rule 12 motions.

9. Undersigned counsel requested today that Plaintiff's counsel stipulate to an additional 42 days, until February 20, 2020, which request was declined.

10. Counsel for Plaintiffs did offer these Defendants the same extension as has been granted to the City Defendants, but otherwise does not concur in the relief requested herein.

11. The Protester Defendants are requesting additional time for the reasons set forth in the accompanying Brief.

12. Plaintiff will not be prejudiced by the relief sought.

WHEREFORE, Defendants HERSKOVITZ, HARB, SAFFOLD, LIST and MARK, respectfully request this Court extend their time to answer or file motions pursuant to F.R.Civ.P. 12(b) to February 20, 2020.

Respectfully submitted,

By: /s/Cynthia Heenan
Cynthia Heenan, P53664
***Attorney for Defendants Henry Herskovitz,
Gloria Harb, Tom Saffold, Rudy List and
Chris Mark***
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Dated: 12/30/19

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Defendants, Jointly and Severally.

BRIEF IN SUPPORT OF:

**DEFENDANTS HERSKOVITZ, HARB, SAFFOLD, LIST AND
MARK'S EX PARTE MOTION TO EXTEND THEIR DEADLINE
TO RESPOND TO COMPLAINT**

CONCISE STATEMENT OF THE ISSUES PRESENTED

- I. Whether the Court will exercise its discretion and authority to extend these Defendants' deadline to file Rule 12(b) motions.

TABLE OF AUTHORITIES

CASES

<i>Caraballo v. Lykes Bros. S.S. Co.</i> , 212 F.Supp. 216 (E.D. PA. 1962)	1
<i>Galdi v. Jones</i> , 141 F.2d 984 (2 nd Cir. 1944).....	1
<i>Orange Theatre Corp. v. Rayhertz Amusement Corp.</i> , 139 F.2d 871 (3 rd Cir. 1944)	1
<i>Rockwood v SKF USA Inc., D.N.H.</i> (unpublished, Civil No. 08-cv-168-JL, 2010 U.S. Dist. LEXIS 38543*; 2010 WL 1576455)	1
<i>Wilkerson v. Jones</i> , 211 F.Supp. 856 (E.D. MI. 2002).....	1

STATUTES

42 U.S.C. §§1981, 1982, 1983, 1985 and 1986	2
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RULES

F.R.Civ.P. 12(b)	<i>infra</i>
F.R.Civ.P. 6(b)(1)	1

BRIEF IN SUPPORT

This Court has the authority to extend the deadline to respond to the Plaintiff's Complaint. Under F.R.Civ.P. 6(b)(1),

When an act may or must be done within a specified time, the court may, for good cause extend the time (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

F.R.Civ.P. 6(b)(1)(B) is inapplicable: a showing of excusable neglect is not required since these Defendants' responses are not yet due. Rather, Defendants' motion is considered under F.R.Civ.P. 6(b)(1)(A). Under (1)(A), it has been observed that the court has "ample power, in its discretion, to extend the time for serving a motion or answer." *Orange Theatre Corp. v. Rayhertz Amusement Corp.*, 139 F.2d 871, 874 (3rd. Cir. 1944), and *Caraballo v. Lykes Bros. S.S. Co.*, 212 F.Supp. 216, 221 (E.D. PA. 1962).

Although Plaintiff's counsel is served with this Motion via the ECF filing system, this Court may grant the relief requested on an *ex parte* basis, without waiting for a response from the Plaintiff, who through counsel, has already indicated that Plaintiff does not concur. *Wilkerson v. Jones*, 211 F.Supp. 856, 858 (E.D. MI. 2002), *Rockwood v SKF USA Inc.*, (unpublished, Civil No. 08-cv-168-JL, D.N.H, 2010 U.S. Dist. LEXIS 38543*; 2010 WL 1576455). See also *Galdi v. Jones*, 141 F.2d 984 (2nd Cir. 1944).

These Defendants are requesting this extension for the following reasons:

- (a) Substantial time will be required to digest the 85-page, 223-paragraph, 20-count Complaint, review the factual allegations with these five Defendants, and to then research and prepare the Rule 12(b)(6) motions;
- (b) The counts are not merely repetitions of the same allegations against the different parties, but rather include numerous distinct causes of action including violation of 42 U.S.C. §§1981, 1982, 1983, 1985 and 1986, violation of the Michigan Elliott-Larsen Civil Rights Act, defamation, false light, intentional infliction of emotional distress and violations of the Michigan Constitution, as well as conspiracy with the City Defendants as to most or all claims;
- (c) The Complaint itself includes extensive citation to case law;
- (d) It will likely be necessary to consult with the City Defendants and/or their counsel since these Defendants are alleged to have conspired with the City Defendants;
- (e) Undersigned counsel, and co-counsel, already have existing obligations to and deadlines involving their current clients;
- (f) Fully articulated and briefed Rule 12 motions will assist the parties and the Court in defining the parameters of the litigation and discovery

going forward in the event that any of the claims survive the Rule 12 motions; and

- (g) Time is obviously not of the essence to the Plaintiff, who has waited 16 years before bringing this action;

WHEREFORE, Defendants HERSKOVITZ, HARB, SAFFOLD, LIST and MARK, respectfully request this Court extend their time to answer or file motions pursuant to F.R.Civ.P. 12(b)(1) to February 20, 2020.

Respectfully submitted,

By: /s/Cynthia Heenan
Cynthia Heenan, P53664
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Chris Mark***
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Defendants, Jointly and Severally.

CERTIFICATE OF SERVICE

I hereby certify that on 12/30/19, I electronically filed ***Defendants Ex Parte Motion to Extend their Deadline to Respond to Complaint***, along with this ***Certificate of Service*** with the Clerk of the Court for the Eastern District of Michigan, using ECF system, which will send notification of such filing to the following registered participants of the ECF system as listed on the Court's Notice of Electronic Filing:

- **Marc M. Susselman**
marcsusselman@gmail.com
- **All counsel of record via the ECF system**

s/Jillian R. Rosati
Jillian R. Rosati
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